IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PINNACLE RESTORATION, L.L.C., an Arizona limited liability corporation, Plaintiff/Appellant, v. DELIAH CHERRY, a single person, Defendant/Appellee.	2 CA-CV 2007-0098 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200600875

Honorable William J. O'Neil, Judge

REVERSED AND REMANDED

Ridenour, Hienton, Kelhoffer, Lewis & Garth, P.L.L.C.
By Brian D. Myers and Tiffany F. Broberg Phoenix
Attorneys for Plaintiff/Appellant

P E L A N D E R, Chief Judge.

¶1 Plaintiff/appellant Pinnacle Restoration L.L.C. ("Pinnacle") appeals from the superior court's denial of post-judgment attorney fees and costs it claimed for enforcing a

judgment Pinnacle previously obtained against defendant/appellee Deliah Cherry. For the reasons stated below, we reverse and remand the case for further proceedings.

Background

¶2 In May 2006, the Florence Justice Court entered a default judgment in favor of Pinnacle and against Cherry. The judgment awarded the principal amount of $2,360.45 plus interest, $602 in attorney fees, $176 in costs, and Pinnacle's "reasonable attorneys' fees and costs to be incurred in connection with enforcement of the judgment to be entered herein." Thus, excluding any award for future fees and costs, the judgment totaled $3,138.45 plus interest.

¶3 In June 2006, Pinnacle filed this action in Pinal County Superior Court, initially seeking a writ of garnishment against Wells Fargo Bank in the amount of $4,622.61, which included post-judgment fees and costs Pinnacle had incurred. Cherry, however, no longer had an account there. On Pinnacle's petition, the superior court then ordered Cherry to appear for a judgment debtor's examination, which she failed to do despite having been personally served with the petition and order.[1] In October, after learning that Cherry was employed by the Pinal County Sheriff's Office, Pinnacle applied for a writ of garnishment against that office as her employer. In that application, Pinnacle stated that "[t]he amount

[1]After Cherry failed to appear for the debtor's examination, the superior court directed Pinnacle to file a "Motion to Show Cause and Contempt," but the record does not reflect that Pinnacle ever did so.

of the outstanding balance due" on the default judgment totaled $7,491.07, which included post-judgment attorney fees and costs.

¶4 The Pinal County Sheriff's Office responded and admitted that Cherry was still employed there. In December, pursuant to A.R.S. § 12-1598.10, Pinnacle requested the superior court to enter an order of continuing lien against Cherry's earnings and filed an affidavit of attorney fees and a statement of costs. In those filings, Pinnacle stated that post-judgment attorney fees totaled $3,584 and that costs, primarily for service-of-process charges, totaled $746.66. In January 2007, the court denied those requests, criticizing Pinnacle's use of an out-of-county process server and finding "both the costs and fees to be unreasonable." Although the court executed the order of continuing lien "to assure payments are receipted" by Pinnacle from Cherry's employer, it reduced the judgment amount Pinnacle had proposed by $2,000 and allowed Pinnacle to supplement its request for fees and costs.

¶5 Thereafter, Pinnacle filed a supplement in support of its requests for post-judgment fees and costs, citing as a basis the justice court's award in the default judgment of "reasonable attorneys' fees and costs to be incurred in connection with enforcement of the judgment." "In an effort to appease the [Superior] Court," Pinnacle again requested an amended order of continuing lien totaling $7,491.07, which apparently included $3,120 in post-judgment attorney fees and $746 in post-judgment costs. Instead, in an amended order filed on May 21, 2007, the superior court reduced the lien amount to $3,138.45 plus

interest, the same amount awarded in the original default judgment, thereby implicitly rejecting any claims for post-judgment fees and costs. On June 7, Pinnacle appealed from that order, and the next day the court entered a separate order expressly denying Pinnacle's claims for additional fees and costs.[2]

Discussion

¶6 Pinnacle timely filed its opening brief requesting this court to reverse the superior court's denial of its claim for post-judgment attorney fees and costs. Although Pinnacle served Cherry with copies of its brief, she failed to file an answering brief. "Where debatable issues are raised, the failure of an appellee to file an answering brief constitutes a confession of reversible error." *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980).

¶7 Reversal on that basis alone, however, is not mandatory. *Id*. An appellate court may, in its discretion, address the merits of the case despite an appellee's failure to file a responsive brief. *See Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App.

[2]The June 7 notice of appeal states that Pinnacle appeals "from the denial of its post-judgment attorney's fees and costs" in the superior court's amended order of continuing lien entered on May 17, 2007. In that order, however, the court did not explicitly deny Pinnacle's fees and costs. Instead, only in its order filed June 8, 2007, did the court expressly do so. Nonetheless, we "review notices of appeal liberally, disregarding technical, harmless errors." *McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 62, 945 P.2d 372, 373 (App. 1997). In addition, even assuming Pinnacle's appeal was premature, it did not prejudice Cherry, and a final order eventually was entered. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). Therefore, we need not dismiss the appeal but rather address the merits.

1994); *see also Gibbons v. Indus. Comm'n*, 197 Ariz. 108, ¶ 8, 3 P.3d 1028, 1031 (App. 1999) (addressing merits when purely legal issue presented); *Roddy v. County of Maricopa*, 184 Ariz. 625, 626 n.1, 911 P.2d 631, 632 n.1 (App. 1996) (addressed issue of whether trial court had discretion to order successful party to pay jury fees). Exercising our discretion, we proceed to the merits of Pinnacle's appeal. Viewing the superior court's order as a final judgment entered in a "special proceeding," we have jurisdiction pursuant to A.R.S. § 12-2101(B).[3] *See* A.R.S. § 12-1598.10 (located in chapter 9 entitled, "Special actions and proceedings to enforce claims or judgments"); *see also Cmty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 630, 898 P.2d 1005, 1008 (App. 1995) (appeal from order of continuing lien of garnishment of earnings); *San Fernando Motors, Inc. v. Fowler*, 17 Ariz. App. 357, 360-61, 498 P.2d 169, 172-73 (1972) ("[A] garnishment proceeding is an independent action.").

Attorney Fees

¶8 Pinnacle contends the superior court erred by denying its claim for post-judgment attorney fees. Generally, we review a trial court's denial of attorney fees for an abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). An abuse of discretion occurs "[w]here there has been an error of law committed in the process of reaching the discretionary conclusion." *Grant v. Ariz. Pub.*

[3]We disapprove of Pinnacle's failure to include in its brief a statement of this court's jurisdiction, as required by Rule 13(a)(3), Ariz. R. Civ. App. P.

Serv. Co., 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982). We find such error here and, therefore, reverse.

¶9 The superior court cited Pinnacle's failure to comply with Rules 54(g)(3) and 58(a), Ariz. R. Civ. P., as grounds for denying the fees and expressed concern that the fees "were simply imposed without regard to due process." The court stated Pinnacle had "ma[de] a mockery of Rule 54(g)(3)." On appeal, Pinnacle argues the civil procedure rules are "necessarily different" in the garnishment context. Pinnacle also points out that Cherry had an opportunity to respond after her employer answered the garnishment and after Pinnacle filed and mailed to her the proposed order of continuing lien, affidavit of fees, and statement of costs.

¶10 The rules the superior court cited do not support its discretionary decision to deny all post-judgment attorney fees and costs. *See Grant*, 133 Ariz. at 456, 652 P.2d at 529; *see also Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13, 167 P.3d 705, 708 (App. 2007). Rule 54(g)(3) merely permits a party in a civil action to support its fee request with affidavits and exhibits and allows an opposing party to respond. Assuming that rule applies in the post-judgment garnishment context, Pinnacle complied with the rule by submitting an affidavit in support of its fee request when it applied for the continuing lien.

¶11 Additionally, the record reflects that the superior court's concerns with Cherry's due process rights were unfounded because she did have notice of Pinnacle's requests for an order of continuing lien and for inclusion of additional, post-judgment

attorney fees and costs. She also had an opportunity to object to those claims. *See Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 426, 831 P.2d 422, 425 (App. 1992) ("The elements of procedural due process are notice and an opportunity to be heard."). Due process is satisfied if notice "is reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Id.*

¶12 Pinnacle personally served Cherry at her residence address with an order to appear for the judgment debtor's examination, which she failed to attend.[4] Thereafter, she was mailed copies of the writ of garnishment, her employer's answer which stated the lien amount was $7,491.07, and Pinnacle's affidavit of post-judgment fees and its statement of costs. All documents were sent to the same residential mailing address where she had accepted personal service of Pinnacle's petition in support of supplemental proceedings and the court's order of appearance. In short, the record reflects that Cherry had adequate notice of the proceedings and Pinnacle's claims. *See id.* She also had an opportunity to object to the answer of the garnishee, her employer, pursuant to A.R.S. § 12-1598.07(A) (written objection to garnishee's answer "must be requested no later than ten days after receipt of the answer"). But she did not do so. Therefore, Rule 54(g)(3) did not support the superior court's complete denial of Pinnacle's fees and costs.

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[4]In its order filed January 10, 2007, the court noted that Pinnacle's "fees to review the file and prepare for and attend the judgment debtor's exam are reasonable of $800." But the court ultimately refused to award any post-judgment fees.

¶13 Apparently referring to Rule 54(g)(2), the superior court also noted that Pinnacle's fee request was untimely. That rule requires a party to file a motion for attorney fees "within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court." The rule also requires the determination of attorney fees to occur after a decision on the merits. *See* Ariz. R. Civ. P. 54(g)(2); *see also Kim v. Mansoori*, 214 Ariz. 457, ¶ 12, 153 P.3d 1086, 1090 (App. 2007); *cf. Allstate Ins. Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261, ¶ 16, 17 P.3d 106, 111 (App. 2000) (request must be timely after entry of summary judgment).

¶14 In noting that Pinnacle's request for fees was untimely, the court neither stated what the deadline was nor specified which order it considered to be "a decision on the merits of the cause" for purposes of calculating the twenty-day time frame. *See* Ariz. R. Civ. P. 54(g)(2). Assuming the court construed the justice court's May 2006 default judgment as such a decision, the court's ruling on untimeliness is counterintuitive. That construction would require Pinnacle to have submitted a request in June for fees incurred later, from June through December 2006. We find Rule 54(g)(2) inapplicable here and the court's ruling on timeliness unsupported. *Cf. Cyprus Bagdad Copper Corp. v. Ariz. Dep't of Revenue*, 196 Ariz. 5, ¶¶ 10-12, 992 P.2d 5, 8 (App. 1999) (delay in requesting fees not unreasonable when fees did not exist until after prevailing on appeal); *Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 38, 119 P.3d 477, 485 (App. 2005) (trial court has discretion to extend time limit where good cause shown).

¶15 Similarly, Rule 58(a), Ariz. R. Civ. P., did not warrant a total denial of Pinnacle's fee request. That rule requires a party seeking attorney fees to "provide in the form of judgment for an award of attorneys' fees in an amount to be entered by the court." *Id*. That form of judgment is to "be served upon all parties and counsel." *Id*. As noted above, Pinnacle mailed to Cherry its writ of garnishment against her employer, and that writ expressly included post-judgment fees and costs. Pinnacle also mailed to Cherry its affidavit in which it claimed fees totaling $3,584. Thus, contrary to the trial court's implicit concern, Cherry did have "an opportunity to object."

¶16 In addition, the first document filed in this action is the justice court's default judgment. Absent any indication that the superior court reviewed or took judicial notice of the justice court's record, the superior court could not determine whether Pinnacle complied with Rule 58(a) because any form of judgment would have been submitted to the Florence Justice Court, before this action was filed in superior court. Therefore, the court abused its discretion by relying on Rule 54 and Rule 58 to deny Pinnacle's requests for fees and costs in their entirety. *See Grant*, 133 Ariz. at 456, 652 P.2d at 529.

¶17 This brings us to the question of whether Pinnacle's claim for fees is substantively supported. Pinnacle bases its entitlement to attorney fees on two possible grounds. First, Pinnacle cites A.R.S. § 12-1598.15(B), which mandates that costs "shall be taxed against the judgment debtor." "It is well established that a court in Arizona may award attorney fees only when expressly authorized by contract or statute." *Burke v. Ariz.*

State Ret. Sys., 206 Ariz. 269, ¶ 7, 77 P.3d 444, 447 (App. 2003). Even assuming that § 12-1598.15 authorizes an award of attorney fees, and not merely costs, Pinnacle failed to cite that statute below. Failure to raise a mandatory statutory basis for attorney fees in the trial court waives the argument on appeal. *See Woodworth v. Woodworth*, 202 Ariz. 179, ¶ 29, 42 P.3d 610, 615 (App. 2002). Therefore, Pinnacle waived any claim for attorney fees based on the statute.

¶18 Second, Pinnacle argues the superior court erred in completely denying all attorney fees because the "court circumvented the Default Judgment entered over one year prior by the Florence Justice Court."[5] In the default judgment, the justice court awarded Pinnacle its "reasonable attorneys' fees and costs to be incurred in connection with enforcement of the judgment to be entered herein." The justice courts are part of this state's judiciary, and "judgments of such courts are entitled to the same respect, to the extent of their jurisdiction, as other judicial tribunals." *Branch v. State*, 15 Ariz. 99, 102, 136 P. 628, 630 (1913); *see also* Ariz. Const. art. VI, § 32; A.R.S. §§ 22-101(B), 22-201. Under the principle of comity, "courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but out of deference and mutual respect." *Leon v. Numkena*, 142 Ariz. 307, 311, 689 P.2d 566, 570 (App. 1984)

[5]Section 22-201(B), A.R.S., provides that "Justices of the peace have exclusive original jurisdiction of all civil actions when the amount involved . . . is ten thousand dollars or less." Because the principal amount Pinnacle sought was under $10,000, the justice court had subject matter jurisdiction to enter the default judgment.

(tribal court's rulings on dissolution of marriage and child custody deemed conclusive in superior court); *see also In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 64, 127 P.3d 882, 899 (2006) (without good reasons, a court should not disturb another court's disposition of a controversy).

¶19 A court reviewing an attorney-fee request, however, does have discretion to reduce the amount of fees awarded based on its consideration of a reasonable "hourly billing rate" and hours expended on the work. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187-88, 673 P.2d 927, 931-32 (App. 1983); *see also ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52-53, 952 P.2d 286, 290-91 (App. 1996). Instead of simply reducing the fees, however, the superior court completely denied all of Pinnacle's post-judgment fees, directly contradicting the justice court's judgment. That total denial, absent any valid legal basis, was an abuse of discretion. *Cf. Hatch v. Hatch*, 113 Ariz. 130, 134, 547 P.2d 1044, 1048 (1976); *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995) (total denial of attorney fees in family law context was abuse of discretion).

¶20 We acknowledge the superior court's legitimate concern with Pinnacle's rapid increase in fees, the arguably excessive time spent on various tasks, and its inclusion of post-judgment fees in both writs of garnishment before it had even filed a request or supporting affidavit, let alone been awarded the fees by any court. But the justice court's judgment entitled Pinnacle to some reasonable post-judgment fees associated with its efforts to enforce the judgment, and Cherry, despite having received notice, failed to object to any of the fees

requested. Therefore, we cannot uphold the superior court's complete denial of all such fees. On remand, the court, in its discretion, ultimately may award fees in an amount less than Pinnacle's request; but the court may not deny fees in their entirety. *See Parker v. McNeill*, 214 Ariz. 495, ¶¶ 23-24, 154 P.3d 1041, 1045 (App. 2007) (no abuse of discretion when reducing attorney fees because superior court is in "best position to assess the value of the legal work performed and the reasonableness of the fees").

Costs

¶21 In support of its argument that the superior court erred by entirely denying its request for post-judgment costs, Pinnacle cites not only § 12-1598.15 but also A.R.S. § 12-341, claiming that an award of costs is mandatory. As noted above, Pinnacle failed to raise § 12-1598.15 below and, therefore, waived that basis for its costs claim. Section 12-341, provides: "The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." As Pinnacle correctly notes, that "language is mandatory." *Roddy*, 184 Ariz. at 627, 911 P.2d at 633. A "court's discretion in awarding costs goes only to the question of which items to allow, not to the actual awarding of costs, which is mandatory in favor of the successful party." *In re Estate of Miles*, 172 Ariz. 442, 444, 837 P.2d 1177, 1179 (App. 1992).

¶22 The superior court did not suggest that Pinnacle was not a successful party in this action. But the court entered a continuing lien in the same amount as the default judgment, denying Pinnacle all costs it incurred, including process-server charges. Expenses

incurred in service of process are considered costs. *See Farm & Auto Supply v. Phoenix Fuel Co.*, 103 Ariz. 344, 345, 442 P.2d 88, 89 (1968). Therefore, the court's total denial of costs was error. Although the court expressed dismay that Pinnacle had unreasonably used an out-of-county process server, that fact might warrant a reduction, not a total denial, of any costs awarded.

Sanctions

¶23 In its final ruling, the superior court noted that it also denied fees and costs "in lieu of sanctions." We construe that comment as an indication that the court essentially equated its total denial of fees and costs as a sanction that it otherwise would have imposed, apparently in an identical amount, had it awarded the fees and costs Pinnacle requested. We review a court's imposition of sanctions for an abuse of discretion. *See Taliaferro v. Taliaferro*, 188 Ariz. 333, 339, 935 P.2d 911, 917 (App. 1996).

¶24 "Courts should not impose sanctions lightly." *In re Estate of Craig*, 174 Ariz. 228, 239, 848 P.2d 313, 324 (App. 1992). We are unable to determine from the record the basis or reasons the court implicitly imposed sanctions.[6] Under Rule 11, Ariz. R. Civ. P., a court "must make proper findings to support its conclusion." *Resolution Trust Corp. v.*

[6]In its final ruling, the court stated: "[Pinnacle] maintains its position that it is entitled to award itself attorney fees without review by the Court and without an opportunity by the Defendant to object to those fees and to garnish accounts and assets based upon the amount it has determined it should award itself." And, as noted above, the court also suggested that Pinnacle had violated various civil procedure rules and Cherry's due process rights. We have found no factual or legal basis for that latter suggestion, nor did the court specifically link the first observation to its later mention of sanctions.

W. Techs., Inc., 179 Ariz. 195, 205, 877 P.2d 294, 304 (App. 1994); *see also Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990). Here, the court did not make such findings.

¶25 We acknowledge that courts have "the inherent power to sanction bad faith conduct during litigation independent of the authority granted by Rule 11." *Hmielewski v. Maricopa County*, 192 Ariz. 1, ¶ 14, 960 P.2d 47, 50 (App. 1997). But "the imposition of sanctions should be preceded by some form of notice and opportunity to be heard on the propriety of imposing the sanctions." *Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555, 880 P.2d 1098, 1101 (App. 1993). The record does not reflect that any such procedural safeguards were used here. In the absence of those protections and specific findings, we cannot uphold the court's total denial of fees and costs as a substitute for sanctions that otherwise would have been ordered.

Attorney fees on appeal

¶26 Pinnacle requests that we award it attorney fees incurred on appeal pursuant to Rule 21(c)(1), Ariz. R. Civ. App. P. That rule, however, is merely a procedural rule that governs claims for attorney fees on appeal made "pursuant to statute, decisional law or contract." *Id.; see also Burke*, 206 Ariz. 269, ¶ 7, 77 P.3d at 447. Pinnacle provided no such substantive basis here. Because Pinnacle cites no other basis for its request for fees, we deny its request. *See In re Wilcox Revocable Trust*, 192 Ariz. 337, ¶ 21, 965 P.2d 71, 75 (App. 1998).

Disposition

¶27 We reverse the superior court's order that completely denied Pinnacle's requests for post-judgment fees and costs. And the case is remanded for a determination of reasonable fees and costs associated with Pinnacle's enforcement of the judgment and entry of findings explaining any sanction the court ultimately might impose.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge